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No. 09-1007

IN THE

Supreme Court of the United States

MOUNTAIN AMERICA, LLC, *et al.*,
Petitioners,

v.

DONNA HUFFMAN,
ASSESSOR OF MONROE COUNTY *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE WEST VIRGINIA MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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March 26, 2010

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DONNA HUFFMAN,
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MOTION FOR LEAVE TO FILE BRIEF OF THE WEST VIRGINIA MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER

Amicus curiae West Virginia Manufacturers Association ("WVMA") respectfully requests leave of this Court to file the following Brief in support of the petition for certiorari in this matter. In support of its motion, WVMA states as follows:

1. WVMA requested the consent of both petitioners and respondents to file its *amicus curiae* brief in this case. Petitioners granted their consent in writing. Petitioners' written consent has been filed with the Court. Respondents refused to consent.

2. WVMA, a non-profit organization, has represented the interests of the manufacturing industries in West Virginia for nearly a century. WVMA

currently has 150 member companies, which employ 25,000 individuals in the state. WVMA engages in policymaking, educates and trains its members, and advocates for them in court.

3. WVMA regularly participates as *amicus curiae* in cases that address issues of importance to its members. For instance, WVMA filed an *amicus* brief in the West Virginia Supreme Court of Appeals in *Bayer MaterialScience, LLC* v. *State Tax Commissioner*, 672 S.E.2d 174 (W. Va. 2008) (per curiam), a decision in which the court below previously concluded that the system challenged here comports with the Due Process Clause of the Fourteenth Amendment.

4. This case is critical to WVMA's membership. WVMA's members own property in West Virginia and pay a substantial portion of the tax revenues collected by counties in West Virginia. Like petitioners here, when WVMA's members conclude that the valuation of their property upon which their taxes are based is excessive or erroneous, the Due Process Clause entitles them to a meaningful hearing before a tribunal that does not suffer from an inherent conflict of interest.

5. WVMA's brief focuses on two of the questions petitioners have presented. Those questions pertain to the county commissioners' pecuniary interest in the property valuation cases they decide, as well as the commissions' inherent conflict of interest between their executive role in administering the counties' finances and their responsibility to adjudicate cases in which a decision favorable to the taxpayer will deprive the commissioners of the very funds upon which they depend as executives. WVMA's brief shows that the decision below upholding West Virginia system for resolving these disputes conflicts

directly and irreconcilably with this Court's well-established due process precedents. *See, e.g.*, *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2260-2261, 2263 (2009); *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973); *Ward* v. *Monroeville*, 409 U.S. 57, 60-62 (1972); *Tumey* v. *Ohio*, 273 U.S. 510, 522, 533-34 (1927). Under the rules established by the court below, taxpayers in West Virginia that attempt to challenge the valuation of their property can no longer insist on their basic constitutional right to a meaningful hearing before an impartial tribunal.

6. WVMA submits that its perspective on the requirements of the Due Process Clause as it relates to West Virginia's system for resolving property tax valuation disputes will assist this Court in determining whether to grant review of the Petition. Therefore, WVMA respectfully moves the Court to grant this Motion and permit the filing of the following Brief.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the Due Process Clause prohibits County Commissioners from deciding Petitioners' challenge to their property tax assessments where the County Commissioners have a substantial financial interest in the outcome of that challenge?

2. Whether the Due Process Clause prohibits County Commissioners from deciding Petitioners' challenge to their property tax assessments where the County Commissioners are executive officers of the county responsible for ensuring that the county has sufficient tax revenues?

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INTEREST OF *AMICUS CURIAE*

The West Virginia Manufacturers Association ("WVMA") is a non-profit organization that has been continuously representing the interests of the manufacturing industries in West Virginia since 1915. Currently WVMA's membership consists of 150 member companies employing 25,000 men and women in West Virginia.[1] WVMA engages in policy-making, educates and trains its members, and provides access to experts in areas including tax, environmental protection, and employment. WVMA also advocates in court on behalf of its members, including as an *amicus curiae*. *See, e.g.*, *Bayer MaterialScience, LLC* v. *State Tax Comm'r*, 672 S.E.2d 174 (W. Va. 2008) (per curiam); *State ex rel. Chemtall Inc.* v. *Madden*, 655 S.E.2d 161 (W. Va. 2007); *Childress* v. *City of Richmond*, 134 F.3d 1205 (4th Cir. 1998) (en banc) (per curiam).

The issues presented in the Petition are especially important to WVMA and its members. WVMA's members represent a sizable portion of West Virginia's economy, and therefore have a significant interest in ensuring that the state's system for property taxation is fair and complies with the

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[1] Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amicus curiae*'s intent to file this brief, and counsel of record for petitioners has consented to its filing. Petitioners' letter of consent has been filed with the Clerk. Because counsel for respondents refused to consent to this filing, the brief is filed upon motion. Pursuant to Rule 37.6, *amicus curiae* WVMA states that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation and submission of this brief.

requirements of the United States Constitution and the Due Process Clause.

In particular, WVMA focuses its brief on the Questions Presented by Petitioners that concern the conflict between the Due Process Clause's requirement or a fair and impartial judge and decision of the court below approving West Virginia's system for valuation of property taxes. *See* Pet. i.-ii (Questions 4 & 5).

SUMMARY OF ARGUMENT

The decision of the West Virginia Supreme Court of Appeals allows county commissioners laboring under direct and clear conflicts of interests to adjudicate challenges to property tax assessments. That ruling conflicts with this Court's decision in *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), and the long line of this Court's decisions setting forth the requirements of the Due Process Clause of the Fourteenth Amendment. The decision below holds that West Virginia law requiring county commissions to adjudicate challenges to property valuations that serve as the basis for the imposition of property taxes does not violate the Due Process Clause. Pet. App. 24a-36a. That decision cannot be reconciled with this Court's precedents explaining that that due process requires an impartial decision-maker.

First, as the court below acknowledged, Pet. App. 29a, 33a, petitioners presented to the court below the issue whether their due process rights were violated because the West Virginia county commissioners who adjudicated their property valuation disputes have a "'direct, personal, substantial, pecuniary interest'" in the outcome of those cases. *Caperton*, 129 S. Ct. at 2259. Under West Virginia law, the salaries of commissioners are based on the

assessed value of all property within the county. *See* W. Va. Code §§ 7-7-3, 7-7-4; *see* Pet. 10, 26-27. As a result, county commissioners have a direct financial incentive to increase the assessed value of property within the county. This financial incentive in property valuation cases is irreconcilable with this Court's due process precedents.

Second, petitioners also presented the issue whether West Virginia's property valuation system violates due process because the county commissioners have a dual role within West Virginia's system of government. Pet. App. 25a-29a. Petitioners explained that county commissioners serve an executive function within local government, and chief among their responsibilities is control over the county's finances. In this capacity, the county commissions have an overwhelming financial incentive that creates the "tempt[ation] to disregard neutrality" in hearing challenges to property valuations. *Caperton*, 129 S. Ct. at 2260. The decision below rejecting petitioners' due process challenge conflicts with this Court's holdings and those of the First, Sixth and Seventh Circuits, and several other lower courts.

STATEMENT OF THE CASE

As shown below, the Court should grant review because the decision below conflicts with this Court's decisions explaining the requirements of the Due Process Clause. As explained by petitioners, the direct pecuniary interest of the individual commissioners of the Monroe County Commission in the outcome of this litigation and the conflict-of-interest created by the executive responsibilities of these county commissioners prohibits them from deciding challenges to property tax assessments.

A. The Requirements Of The Due Process Clause.

The Fourteenth Amendment to the United States Constitution provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In *Caperton*, this Court explained that "'[a] fair trial in a fair tribunal is a basic requirement of due process.'" 129 S. Ct. at 2259 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).[2] As a result, "[n]o man can be a judge in his own case,'" and no judge "'is permitted to try cases in where *he has an interest in the outcome.*'" *Id.* at 2261 (emphasis added). To implement the requirements of Due Process, the Court has insisted on "objective standards that do not require proof of actual bias." *Id.* at 2263 (collecting cases). As a result, "[d]ue process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" *Id.* at 2265 (quoting *Murchison*, 349 U.S. at 136).

A judge's financial interest in the outcome of a case is the prototypical violation of due process. *See Caperton*, 129 S. Ct. at 2259-60. Thus, due process is violated where the tribunal has "a direct, personal, substantial pecuniary interest" in a case. *Tumey* v. *Ohio*, 273 U.S. 510, 523 (1927); *accord Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973) (striking down administrative board procedure for licensing optometrists because optometrists who served on the

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[2] *Accord Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980) (due process requires "neutrality" and reflects "the powerful and independent constitutional interest in fair adjudicative procedure"); *Ward* v. *Monroeville*, 409 U.S. 57, 62 (1972) (due process requires "a neutral and detached judge in the first instance").

board had a pecuniary interest of "sufficient substance" that they could not preside).

A direct pecuniary interest, however, does not exhaust the limits of due process in this context. *See Caperton*, 129 S. Ct. at 2260. Instead, the Due Process Clause prohibits "[e]very procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between" the litigants. *Tumey*, 273 U.S. at 532. As a result, "[a] situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law." *Id.* at 534.

For example, in *Ward*, this Court invalidated on due process grounds a system in which the mayor also served as a judge because of the "'possible temptation'" that his "executive responsibilities for village finances may make him partisan to maintain the high level of contribution [to those finances] from the mayor's court." 409 U.S. at 60; *accord Caperton*, 129 S. Ct. at 2260 (following *Ward*); *Tumey*, 273 U.S. at 522, 533-34.

B. West Virginia's County Commissions.

Two aspects of West Virginia's County Commission system are implicated in this case: the role played by county commissioners in the fiscal governance of individual counties and the manner in which the salaries of county commissioners is determined.

First, under West Virginia law, County Commissions are charged with administering the "fiscal affairs of their counties" and "lay[ing] and disburs[ing] the county levies." W. Va. Const. art. IX, § 11. By statute, county commissions "supervise the general management of the fiscal affairs and business

of each county." W. Va. Code § 7-1-5. As the West Virginia Supreme Court of Appeals has ruled, county commissions "are the central governing body of the county." *State ex rel. Dingess* v. *Scaggs*, 195 S.E.2d 724, 725 (W. Va. 1973).[3] The county commission presiding over West Virginia's most populous county has explained, "[t]he primary function of the County Commission is budget development and management, overseeing purchasing for the county, [and] management of county assets."[4]

The executive functions of county commissions are limited by the amount of taxes that the county is able to levy and collect. *See, e.g., State ex rel. Lambert v. Cortellessi*, 386 S.E.2d 640, 642 & n.2 (W. Va. 1989). A "dwindling tax base" in a county decreases the funds available to the county commission which, in turn, causes the county commission to substantially reduce budgets and cut county employees.[5] Thus, "[t]he *ad valorem* tax is the most fundamental tax imposed upon the citizens of this State to fund local government." *State ex rel. County Comm'n* v. *Cooke*, 475 S.E.2d 483, 491 (W. Va. 1996) (citation omitted). In 2007, for instance, property taxes comprised 77.4% of the tax revenue to support local governments in West Virginia.[6]

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[3] *See* W. Va. Code §§ 7-1-3, 7-1-5 (setting forth jurisdiction and duties of the commissions); *see also* W. Va. Const. art. IX, § 10 (providing for the popular election of commissioners).

[4] Kanawha County Comm'n, *Mission Statement*, *at* http://www.kanawha.us/commission/.

[5] *Cf. Killen* v. *Logan County Comm'n*, 295 S.E.2d 689, 712 (1982) (Neely, J., dissenting) ("The pressures on the county commissions are probably such that they will quickly use all money available to them.").

[6] *See* http://www2.census.gov/govs/estimate/07slsstab1b.xls.

County commissions, in their executive role, control how tax collections are budgeted and oversee the collection of such taxes. West Virginia law imposes a "duty" on "county commissions to assist the tax commissioner in his efforts to ascertain the true value of all such property and . . . to see to the proper and fair valuation of property within their respective counties." W. Va. Code § 11-1A-29a. The county commissions meet annually to review property valuations made by the Tax Commissioner and assessors. *Id.* § 11-3-24.

As relevant here, the county commissioners are responsible for adjudicating tax payer challenges to the valuation of their property. *Id.*; *In re Tax Assessment Against Am. Bituminous Power Partners, LP*, 539 S.E.2d 757, 761 (W. Va. 2000) ("initial avenue for relief from an allegedly erroneous property valuation lies with the county commission"). To prevail, a taxpayer appearing before the commissions "must prove by clear and convincing evidence" that the assessment is erroneous. *In re Tax Assessment of Foster Found.'s Woodlands Ret. Cmty.*, 672 S.E.2d 150, 161-68 (W. Va. 2008) ("*Foster Foundation*").[7]

Second, the annual salary of county commissioners depends upon the total property valuation within a county. W. Va. Code §§ 7-7-3(b), 7-7-4(e). Specifically, by West Virginia statute, counties are assigned

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[7] The county commissions' decisions are appealable to the West Virginia circuit courts, but "'will not be set aside if there is substantial evidence to support them.'" *Am. Bituminous*, 539 S.E.2d at 761 n.6. The Supreme Court of Appeals will not reverse a circuit court's decision "when supported by substantial evidence unless plainly wrong." Pet. App. 13a (internal quotation marks and citations omitted); *accord Foster Found.*, 672 S.E.2d at 155; *id.* at 154 (reviewing "'underlying factual findings under a clearly erroneous standard'").

one of ten classifications based on the "valuation of property" within the county. *Id.* § 7-7-3(b). At one end of the range are Class I counties where the assessed value of all classes of property exceeds $2 billion, and at the other are Class X counties in which the assessed value of all classes of property is between $0 and $199,999,999. *Id.* By statute, a county's classification controls the salary of commissioners and other elected officials within the county. *Id.* § 7-7-4(e). For instance, a commissioner elected in a Class I county has an annual salary of $36,960, whereas a commissioner in a Class X county is paid $19,800. *Id.* § 7-7-4(e)(5).

Based on the valuations that are subject to this petition, Monroe County qualified as a Class VIII county for the period in question (valuation between $300 million and $399,999,999). *See* Pet. 26 & n.7. Because the valuation of all property in Monroe County increased by roughly $30 million during the tax year relevant here—with more than one-third of that increase attributable from the valuation of petitioners' properties—Monroe County moved from a Class IX county to a Class VIII county. *Id.* at 7, 25-26. This reclassification caused the salary of each Monroe County commissioner to increase by $660, from $24,420 to $25,080. *Id.* at 26; *see* Pet. App. 29a, 33a; *see also* W. Va. Code § 7-7-4(e)(5) (showing, for instance, that other one-class differences may increase or decrease commissioners' salaries by up to $5940).

REASONS FOR GRANTING THE PETITION

I. BY ALLOWING COMMISSIONERS TO ADJUDICATE PROCEEDINGS IN WHICH THEY HAVE A PECUNIARY INTEREST, THE DECISION BELOW CONFLICTS WITH HOLDINGS OF THIS COURT.

Review should be granted because the decision below approved a process whereby petitioners' challenges to their property tax valuations were decided by county commissioners who stood to benefit financially by rejecting petitioners' claims. The West Virginia Supreme Court of Appeals' decision conflicts with this Court's Due Process precedents.

1. Petitioners demonstrated to the court below that each county commissioner would personally receive an additional $660 by denying petitioners' claim that their property tax assessment was excessive. *See* Appellants' Br. 28-29; Pet. App. 29a, 33a.[8] That system plainly violates the requirements of due process.

As explained by this Court just last year, the Due Process Clause prohibits a tribunal from "ha[ving] 'a direct, personal, substantial pecuniary interest' in a case" pending before it. *Caperton*, 129 S. Ct. at 2259 (quoting *Tumey*, 273 U.S. at 523). In *Caperton*, this Court reiterated that the "Due Process Clause prohibits judges from deciding cases in which they

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[8] This same pecuniary interest is implicated in *every* property valuation challenge before West Virginia's county commissions because there is "a direct correlation" between the value of assessed property in a county and the salaries received by county commissioners in that county. W. Va. Code § 7-7-1(b); *see id.* §§ 7-7-3(b), 7-7-4(e)(4) (commissioners' salaries); Appellants' Br. 28.

would have a financial interest that would "tempt adjudicators to disregard neutrality." *Id.* at 2260.

Caperton underscored the continuing vitality of this Court's Due Process precedents in *Tumey* and *Gibson*. In *Tumey*, a mayor of a village also served as a judge. 273 U.S. at 515-17. He received a salary supplement for his judicial duties if he convicted those brought before him, getting a portion of the fines assessed in each case, including $12 in the case under review. *Id.* at 520, 523. This Court held that the judge's "direct pecuniary interest in the outcome" of the proceeding violated the Due Process Clause. *Id.* at 535. It did so even though it recognized that "[t]here are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it." *Id.* at 532; *accord Caperton*, 129 S. Ct. at 2260.

Applying these objective standards, this Court held in *Gibson* that even an indirect or contingent pecuniary stake in the subject of litigation violates due process. *See* 411 U.S. at 579. There, an association of optometrists, whose membership was limited to independent practitioners, filed unprofessional conduct charges against non-independent optometrists. *Id.* at 567-68. The tribunal hearing the charges was comprised exclusively of independent optometrists. *Id.* at 567, 578. This Court held that the non-independent optometrists had their due process rights violated by having to defend the charges before the board. *Id.* at 578-79. The Court ruled that the due process rights of the non-independent optometrists were violated because the tribunal deciding the case "was composed solely of optometrists in private practice for their own account" and "success in the Board's efforts would possibly redound to the personal benefit of members of the board." *Id.* at 578.

The decision below violates these clear rules. Here, the pecuniary interests of the county commissioners are even more concrete than in *Gibson*. It is undisputed that the county commissioners earned a $660 salary increase as a direct result of their decision rejecting petitioners' property valuation challenge. This is precisely the type of "direct pecuniary interest" in the outcome of the proceedings that rendered the mayor's court system unconstitutional in *Tumey*.

2. The court below nevertheless swept aside petitioners' constitutional challenge. The court below did not dispute that the county commissioners stood to benefit financially and directly if they rejected petitioners' challenge. Instead, the court questioned whether "a pay increase of $660.00 would in fact constitute a substantial pecuniary interest prohibiting the County Commission from adjudicating this dispute." Pet. App. 33a (citing *Gibson*, 411 U.S. at 579).

First, the suggestion that a salary increase of $660 is not a "substantial pecuniary interest" is not supported by *Gibson* or any other precedents of this Court. As shown above, the pecuniary interest in *Gibson* was far more tenuous than the $660 that the commissioners received as a result of their decision here. Moreover, $660—*i.e.*, nearly a three percent raise in their annual salary—is far removed from the type of *de minimis* benefit that the *Tumey* court suggested would not offend the Due Process Clause. *See* 273 U.S. at 531 (due process is violated where a judge accrues a pecuniary benefit as a result of his or her decision "unless the [sums] . . . are so small that they may be properly ignored as within the maxim *de minimis non curat lex.*"). It cannot be described as "a minute, remote, trifling or insignificant interest."

Id. at 532. On the contrary, $660 is precisely the type of incentive that, although it might be resisted by some commissioners, "would offer a possible temptation to the average man as a judge." *Id.* ("There are doubtless mayors who would not allow a consideration as *$12* costs in each case to affect their judgment in it.") (emphasis added); *accord Caperton*, 129 S. Ct. at 2260.[9] The county commissioners' direct financial interest in the outcome of the valuation proceedings here presents a more "serious, objective risk of actual bias" than the indirect link between the financial contributions to the campaign of Justice Benjamin held unconstitutional in *Caperton*. 129 S. Ct. at 2265; *see id.* at 2268 (Roberts, C.J., dissenting) (calling due process cases involving a decision-maker's "'direct, personal, substantial pecuniary interest'" "relatively straightforward") (quoting *Tumey*); *id.* at 2273.

Second, and equally baseless, is the suggestion by the court below that it could avoid the due process challenge by ruling, in its view, that "the Assessor's valuation of Mountain America's residual property was not excessive." Pet. App. 33a. That ruling directly conflicts with this Court's holdings in *Ward*, 409 U.S. at 61-62, and *Tumey*, 273 U.S. at 535. In

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[9] Moreover, the difference in salary for a commissioner whose county moves from Class VI to Class V (or vice-versa) is $5940. W. Va. Code § 7-7-4(e)(5); *see, e.g., id.* ($4620 difference in salary between Classes IX and X, $2640 difference between Classes VIII and VII). Indeed, because it is the value of *all* property within a county that sets the commissioners' salaries, this pecuniary interest inevitably acts as a thumb on the scale in every single valuation before the commissions. While a single valuation challenge, unlike here, may not tip a county over the threshold from one classification to another, commissioners have an inherent interest in holding the line against tax payers' challenges to assessments across the board.

Tumey, this Court rejected the argument that "the evidence shows clearly that the defendant was guilty and that he was only fined . . . the minimum amount, and therefore that he can not complain of a lack of due process." *Id.* Chief Justice Taft explained, "[n]o matter what the evidence was . . . he had the right to have an impartial judge . . . and was entitled to halt the trial because of the disqualification of the judge." *Id.* Likewise, in *Ward*, the Court rejected the suggestion that "unfairness at the trial level can be corrected on appeal and trial *de novo*" because a litigant is "entitled to a neutral and detached judge in the first instance." 409 U.S. at 61, 62.

The same principles apply here. The West Virginia Supreme Court of Appeals' post-hoc conclusion that the county commission's valuation decision was proper does not insulate the commission's ruling from scrutiny under the Due Process Clause. Even *de novo* review is inadequate to remedy a due process violation. Here, however, the court below affirmed the valuation based upon a deferential standard of review that deferred to the decisionmaking of the tribunal alleged to labor under a direct conflict of financial interest. Pet. App. 13a, 36a, 40a, 59a; *see supra* at 7 n.7 (discussing applicable standards of review). Therefore, the West Virginia Supreme Court's contrary suggestion that it could resolve petitioners' challenge on independent state-law grounds cannot be squared with this Court's holdings.

II. THE COMMISSION'S RESPONSIBILITY FOR THE COUNTY'S FISCAL AFFAIRS CONFLICTS WITH ITS OBLIGATION TO ADJUDICATE TAX APPEALS IMPARTIALLY.

The petition also should be granted because the decision below holds that the Due Process Clause does not prohibit county commissions from adjudicating valuation challenges even though county commissioners have a conflicting interest as a result of their executive obligations for the county. That ruling also conflicts with this Court's cases under the Due Process Clause. *See, e.g., Ward*, 409 U.S. at 58-61; *Tumey*, 273 U.S. at 522, 532-34.

1. In this case, Petitioners showed that their due process rights also were violated because the county commission "has an inherent bias because its primary responsibility is the superintendence of its county's fiscal affairs." Pet. App. 25a. In rejecting this challenge, the court below reaffirmed two of its own recent decisions holding that Due Process does not constrain a county commission from deciding taxpayer challenges to property assessments. *Id.* at 27a-28a (following *Foster Found.*, 672 S.E.2d 160 & Syl. Pt. 6; *Bayer MaterialScience*, 672 S.E. 2d 174). *Foster Foundation* and *Bayer MaterialScience* conflict with this Court's holdings in *Ward* and *Tumey*.

In *Foster Foundation*, the West Virginia Supreme Court of Appeals rejected the due process challenge now presented here based on the following reasoning:

> When faced with cases questioning the impartiality of a hearing tribunal, the Supreme Court of the United States generally has found a hearing tribunal to be partial when there exists a direct pecuniary interest in the outcome of the

> litigation. *However, when no such pecuniary interest is present, the Supreme Court of the United States typically has found the tribunal to satisfy the requirements of due process.*

672 S.E.2d at 159-60 (internal citations omitted, emphasis added). That holding conflicts with this Court's decisions.

Last year, in *Caperton*, this Court expressly rejected this very same conclusion, holding that Due Process prohibits "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required . . . or which might lead him not to hold the balance nice, clear and true [between the litigants] denies . . . due process of law." 129 S. Ct. at 2260 (quoting *Tumey*, 273 U.S. at 532).

Caperton followed *Ward*, in which this Court held that Due Process prohibited a mayor with broad executive powers from adjudicating cases in his dual role as a judge because "revenue produced from [the] . . . court provides a substantial portion of [the] municipality's funds," explaining that an arbiter's pecuniary interest "in the fees and costs [collected by the court] *d[oes] not define the limits of the [due process] principle.*" *Ward*, 409 U.S. at 59-60 (emphasis added). The Court explained that the "'situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, *necessarily involves a lack of due process of law.*'" *Id.* at 60 (emphasis added) (quoting *Tumey*, 273 U.S. at 534); *see Tumey*, 273 U.S. at 521-22 (recognizing that funds collected by the mayor's court went to "village improvements and repairs"); *accord Caperton*, 129 S. Ct. at 2260.

These same principles apply directly to West Virginia's system whereby county commissions are required to serve two conflicting interest. In West Virginia, the county commissions are the executive body charged with superintendence of the fiscal affairs of the counties. As a result, their determination of challenges, which if accepted, would reduce the counties' tax base presents a significant temptation to err on the side of rejecting a challenge to a property tax assessment.

Property taxes make up the majority of the county governments' revenues both in rural counties, like the one at issue here, and in more populated and industrialized counties. For instance, in Kanawha County, the State's most populous county, property taxes for the 2009-2010 fiscal year accounted for $34,785,646 of the $56,506,489 of the projected revenue for the County's General Fund, or 61.5% of revenue. *Cf. Ward*, 409 U.S. at 58 (noting that "major part" of the village income, 35 to 50 percent of general revenues, was implicated in the unconstitutional mayor's court). Projected expenditures from the General Fund included those for general government (53.6%), public safety (29.9%), health & sanitation (3.5%), culture & recreation (8.8%), and capital projects (4.2%).[10] Similarly, in Monroe County, property taxes for the same period accounted for $1,141,748 of the $2,158,497 (52.9%) of the projected revenue for the County's General Fund. Projected expenditures from the General Fund similarly included general government (60.8%),

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[10] http://www.wvsao.gov/localgovernment/files/levy/county_09-10/Kanawha%20County%202009-2010.pdf.

public safety (38.1%), culture & recreation (0.2%), and social services (0.9%).[11]

As in *Ward* and *Tumey*, the collections overseen by West Virginia commissions in their adjudicative capacity are the lifeblood of the county's executive functions. *See* Pet. 24; *Caperton*, 129 S. Ct. at 2260 (discussing the "possible temptation[s]" of executives that fulfill these dual adjudicatory roles). Any relief that a county commission orders for a taxpayer challenging an assessment reduces the tax base of the county, and thus threatens the commissioners, as executives, to reduce county services.[12] In this light, any taxpayer who appears before the County Commission challenging the assessment of property subject to tax must persuade a decisionmaker who has a clear and unmistakable vested interest in rejecting the taxpayer's appeal. For a manufacturer operating in West Virginia, a decision by a county

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[11] http://www.wvsao.gov/localgovernment/files/levy/county_09-10/Monroe%20County%202009-2010.pdf.

[12] Indeed, in the county commission proceedings underlying the decision in *Bayer MaterialScience*, 672 S.E.2d 174, the commissioners explicitly fretted that relief in the tax payers' favor would make their primary executive roles more difficult. *See* Br. of Appellants, at 18-19, 24-25, *Bayer MaterialScience*, Nos. 33378 et al. (W. Va. May 16, 2008). For instance, the President of the County Commission candidly acknowledged: "'You are talking arguably [about a] $350,000.00 loss to the Board of Education [if the taxpayer prevailed].'" *Id.* at 19 (quoting hearing transcript); *id.* at 21 (quoting commissioner's comment that "'[t]hese decisions have a real impact on the tax base of this State and County'"). Similarly, although the hearings before the commission ostensibly are about whether the *valuation* of the property is well-supported, the commissioners frequently ask taxpayers for the exact amount of the reduction in tax revenue that would occur were the valuation decisions reversed. *See id.* at 25 n.15.

commission to reduce the corporation's relatively large tax burden necessarily has a correspondingly large detrimental effect on the county funds available to operate the county for the benefit of its citizens. Thus, as here, the inherent conflict is especially stark. Nonetheless, even for the residential taxpayers with the smallest tax burden, the county commissions may be tempted to avoid any detriment to their treasury and may have a considerable interest in creating precedent that would encourage a greater number of taxpayers to challenge their property valuations.

2 Having overlooked these governing rules in *Foster Foundation*, the West Virginia Supreme Court of Appeals rejected the due process challenge to the county commissions' dual roles because the challenger had not "*prove[n]* the . . . County Commissioners' partiality or that their dual role [in adjudicating the valuation dispute] was compromised by this alleged divided loyalty." 672 S.E.2d at 160 (emphasis added); *accord* Pet. App. 28a (denying due process challenge based on the holding in *Foster Foundation*); *Bayer MaterialScience*, 672 S.E.2d at 184-85 (same).

This "proof of bias" requirement applied by the West Virginia Supreme Court of Appeals conflicts with this Court's holdings. As reiterated in *Caperton*, "[t]he Due Process Clause has been implemented by *objective standards that do not require proof of actual bias*." 129 S. Ct. at 2263 (emphasis added) (collecting cases); *accord Ward*, 409 U.S. at 60 ("the test is whether the . . . situation is one 'which would offer a possible temptation to the average man as a judge'"); 409 U.S. at 60 (noting "presumption of bias" that applies when the test is met); *id.* at 61 (rejecting

argument that challenger must show "special prejudice in his specific case").[13]

3. The rejection of these principles by the court below also conflicts with the decisions of a number of federal courts of appeals, district courts and state courts of last resort.

In *Esso Standard Oil Co.* v. *Lopez-Freytes*, the First Circuit held that a fine imposed by an administrative board violated the Due Process Clause. 522 F.3d 136, 145-47 (1st Cir. 2008). The court of appeals explained that the board had a "structural bias" stemming from "the potential financial benefit to the [board's] budget as a result of an imposed fine." *Id.* at 146 (discussing *Ward*). Similarly, in *DePiero* v. *City of Macedonia*, the Sixth Circuit, applying *Ward*, held that a mayor's court system deprived plaintiffs contesting traffic charges of due process because the mayor was responsible for "prepar[ing] the city's budget" and was accountable for the "fiscal health of the municipality as its chief executive." 180 F.3d 770,

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[13] In *Foster Foundation*, the West Virginia Supreme Court of Appeals principally relied on this Court's decision in *Dugan* v. *Ohio*, 277 U.S. 61, 65 (1928), for the proposition that where "no . . . pecuniary interest is present" this Court "typically has found the tribunal" to satisfy due process." 672 S.E.2d at 160. But *Dugan* does not support that claim. The West Virginia court asserted that *Dugan* "rul[ed] that mayor serving as judge had relationship too remote with city finances to warrant presumption of bias in prohibition law cases over which he presided and imposed fines where mayor received fixed salary, did not receive additional compensation from fines he imposed as judge, and was not solely responsible for expenditure of town's revenue." *Id.* In fact, *Dugan* held that that no unconstitutional conflict of interest was present because—unlike *Ward*, *Tumey* and the present case—"[t]he mayor has *no executive*, and exercises *only judicial* duties." 277 U.S. at 63 (emphasis added).

782 (6th Cir. 1999). In *United Church of the Medical Center* v. *Medical Center Commission*, the Seventh Circuit held a system for adjudicating title reverter violated due process because of the state "Commission's dual status as judge and a party interested in the outcome of the proceedings." 689 F.2d 693, 700 (7th Cir. 1982). Applying *Ward* and *Berryhill*, the Seventh Circuit recognized that, notwithstanding the lack of personal benefit to commissioners, the system over which they presided was unconstitutional because property reverted to the commission without cost and "the proceeds redound to [its] coffers." *Id.* And, in *Meyer* v. *Niles Township*, a district court held that a panel of township supervisors that had "sole discretion to determine if an applicant is entitled to [aid to medically indigent] benefits, payment of which is derived from the funds of the township" resulted in a denial of due process because, "[a]s supervisors, the [panelists] ha[d] an interest in protecting township funds." 477 F. Supp. 357, 362 (N.D. Ill. 1979).

Likewise, in *Gore* v. *Emerson*, the Arkansas Supreme Court held that due process prohibited trial before a mayor, as judge of the city court, where the fines assessed were paid into city's general fund. 557 S.W.2d 880, 883-84 (Ark. 1977) (en banc). The court held that "[t]he fact that the mayor does not receive any fee or additional compensation because of a conviction is of no real significance." *Id.* at 883.[14]

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[14] Additionally, in *In re Ross*, 656 P.2d 832 (Nev. 1983), the Nevada Supreme Court held that attorneys were deprived of due process because they had to challenge disciplinary fines before a Board of Bar Governors which was compromised by its interest in "protect[ing] the financial integrity of the bar association" where the fines imposed would have comprised a substantial amount of the bar's total revenue. *Id.* at 836-38.

* * * *

Review should be granted because the decision of the West Virginia Supreme Court of Appeals upholding West Virginia's system for adjudicating property valuation disputes is incompatible with baseline requirements of due process. The decision below conflicts with the holdings in *Caperton*, *Gibson*, *Ward* and *Tumey*, and with the decisions of numerous lower courts that have followed this Court's binding precedents.

Amicus WVMA respectfully submits that this Court's immediate review is imperative.

CONCLUSION

For these reasons, and those stated by petitioners, the petition should be granted.

Respectfully submitted,

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